MAY 28 1974
MICHAEL RODAK, JR.,

IN THE UNITED STATES SUPREME COURT

OCTOBER 1973 - JUNE 1974 TERM

NO. 73-1355

EDWARD FRANCIS KUNTZWEILER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
Directed to the United States
Court of Appeals for the
Ninth Circuit

PETITIONER'S REPLY TO MEMORANDUM OF THE GOVERNMENT IN OPPOSITION

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The GIST of the Government's argument to sustain conviction appears to be this excerpt taken from page 4 of its Response in Opposition:

> "The facts set forth above provide ample evidence from which a jury could have found beyond a

reasonable doubt that a conspiracy existed. Payne, Brazil and petitioner were all involved IN THE PURCHASE AND SALE OF MATERIALS THAT COULD ONLY BE USED IN THE MANUFACTURE OF ILLEGAL DRUGS. They jointly decided to falsify sales records to conceal the name of the purchaser. Petitioner offered to pay Payne in illegal drugs, and Payne, though declining the offer, continued to supply petitioner with the necessary materials."

The answer to the Government's argument in this respect are the cases of U.S. v.Falcone, 311 U.S. 204, 85 L ed 128, 61 S.Ct. 235, and Glasser v. United States, 315 U.S. 60, 86 L ed 680, 62 S.Ct. 457, the latter having been cited in support of its (the Government's) position.

It was held in Falcone, supra, that the seller of goods is not a co-conspirator with the BUYER BECAUSE HE KNEW THAT THE BUYER MEANT TO USE THE GOODS TO COMMIT A CRIME. See also Hicks v. U.S., 150 442, 37 L ed 1137, 14 S.Ct. 144; Abrams v. U.S., 250 U.S. 616, 63 L ed 1173, 40 S.Ct. 17; Santa Cruz Fruit Packing Co. v.National Labor Relations Bd., 303 U.S. 453, 82 L ed

954, 58 S.Ct. 656; Direct Sales Co. v. U.S., 319 U.S. 702, 87 L ed 1674, 63 S.Ct. 1265; Ingram v. U.S., 360 U.S. 672, 3 L ed 1503, 79 S.Ct. 1314.

Payne can be likened to Alexander Campbell in Glasser, supra, who as a U.S. Assistant Attorney was offered a bribe and declined it, as Payne declined payment in "speed" in the instant case. It would have been pure folly to have proceeded against one as a co-conspirator because of such an offer.

Payne can further be likened to the two Falcones in U.S. v. Falcone, supra, sugar jobbers, where in an effort to establish guilty knowledge, the Government relied upon evidence showing that their volume of sales was materially larger during the periods of illicit activity, and that the Falcones were on several occasions seen in conversation with the conspirators and were seen in a restaurant patronized by the conspirators. That another respondent, one

Alberico, sold sugar, and his sales increased during illicit operations; that some of the containers bore Alberico's name, but that on eight or ten occasions, he sold sugar and cans in unnamed amounts; that on one occasion he was overheard to say in refusing credit, "I could not trust you because your business is too risky."

Further, in Falcone, supra, one respondent, Nicholas Nole, was shown to be proprietor of Acme Yeast Company and Utica Freight Forwarding Company. To show guilty knowledge, the Government relied on circumstances that showed he registered the Acme Yeast Company in the County Clerk's office in the name of a cousin; that an order for the consignment of K. & M. yeast was placed in the name of an unidentified person; that Nole had been seen in conversations with some of the convicted distillers at a time when the illicit stills were in operation; that on three occasions, a convicted defendant procured yeast in cartons and kegs,

and Nole told the person in charge of the store to let them have it; that Nole's information return to the Government of all sales in excess of five pounds did not show in February or March, 1938, any sale of yeast or any sale of keg yeast to this convicted defendant.

In Falcone, the Court of Appeals for the Second Circuit of New York reversed a conviction of the Respondents and the Government petitioned on a Writ of Certiorari for a review of the judgment reversing conviction, and this Court held:

> "The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeds on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, AND FELL SHORT OF SHOWING RESPONDENTS' PARTICIPATION IN THE CONSPIRACY OR THAT THEY KNEW OF IT."

and:

> "We are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials WOULD

BE USED FOR ILLICIT DISTILLING IF IT DOES AS MUCH IN THE CASE OF SOME. In the case of Alberico, as in the case of Nicholas Nole, the jury could have found that he knew that one of their customers who was an unconvicted defendant was using the purchased material in illicit distilling. But it could not be inferred from that or from THE CASUAL AND UNEXPLAINED MEETINGS of some of respondents with others who were convicted as conspirators that respondents KNEW OF THE CONSPIRACY. The evidence respecting the volume of sales to any known to be distillers is too vague AND INCONCLUSIVE TO SUPPORT A JURY FINDING THAT RESPONDENTS knew of A CONSPIRACY... Respondents are not charged with aiding and abetting illegal distilling, AND THEY CANNOT BE BROUGHT WITHIN THE SWEEP OF THE GOVERNMENT'S CONSPIRACY DRAGNET IF THEY HAD NO KNOWLEDGE THAT THERE WAS A CONSPIRACY."

and:

"Those having no knowledge of the conspiracy are not conspirators, U.S. v. Hirsch, 100 U.S. 33, 34, 25 L ed 359, 540; Weniger v. U.S. (CCA 9th) 47 F (2d) 692, 693; and one who 'WITHOUT MORE FURNISHES SUPPLIES TO AN ILLICIT DISTILLER IS NOT GUILTY OF CONSPIRACY even though his sale MAY HAVE FURTHERED THE OBJECT OF A CONSPIRACY TO WHICH THE DISTILLER WAS A PARTY BUT OF WHICH THE SUPPLIER HAD NO KNOWLEDGE."

The Government, at page 4 of its Response in Opposition, states:

> "They jointly decided to falsify sales records to conceal the name of the purchaser."

From the first part of 1969 until the middle of June of 1969, Payne was selling Petitioner apparatus and chemicals without any mention having been made to him as to what use was going to be made of same, except for leather in his (Petitioner's) Boutique shop. The talk about not having the purchaser's name appear in the record took place before the middle of June of 1969 (Tr. 92) at a time when PAYNE HAD NOT EVEN BEEN ADVISED AS TO WHAT USE WOULD BE MADE OF THE CHEMICALS, so without having any knowledge whatsoever as to what use was going to be made of same, how could he be catogorized as a conspirator. When Payne was finally advised in the middle of June of 1969 (Tr. 92) as to what use would be made of the chemicals, he was at best informed that they MIGHT BE used to manufacture speed.

CONCLUSION

In the light of the decisions of this Court cited above, can it be said that there is a FACTUAL FOUNDATION or any SUBSTANTIAL EVIDENCE whatsoever upon which to base a finding that there was agreement between Payne and this defendant to manufacture drugs. Indeed, everything in the record points to the contrary. Payne himself testified that he could not swear under oath or to an absolute certainty that the Petitioner was going to manufacture speed or any particular drug (Tr. 117, 118); this from the very mouth of the Government's own witness.

Can the conduct of Payne in this case be likened to the acts, conduct and participation of Kretske and Roth in Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L ed 680, cited by the Government in support of its position. There is no basis or similarity for comparison whatsoever.

In Carroll v. U.S., 267 U.S. 132, 45 S.Ct. 280, 69 L ed 543, this Court said:

> "The efforts of...officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of this land."

This Court is the only remaining bulwark between this Petitioner's freedom and his unjust and unconstitutional imprisonment for a term of four years in a Federal Penitentiary.

Respectfully submitted,

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